

**UNITED STATES OF AMERICA
AMICUS BRIEF
FOR THE NATIONAL LABOR RELATIONS BOARD**

NORTHWESTERN UNIVERSITY
Employer

and

Case 13-RC-121359

COLLEGE ATHLETES PLAYERS
ASSOCIATION (CAPA)
Petitioner

**BRIEF OF *AMICUS CURIAE* ON INVITATION BY THE
NATIONAL LABOR RELATIONS BOARD**

“Workplace Decision Making in Contemporary Academia:
What is the Nature of Student Employment?”

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Affiliation noted for identification purposes. The views presented here do not represent the position of any particular university.

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STATEMENT OF INTEREST OF AMICUS CURIAE

The NLRB has expressed interest in reconsidering whether to overturn the 2004 *Brown* decision (342 NLRB 483). Acknowledging that the Board will surely hear arguments characterizing the work of undergraduate football employees, by participating as an amicus here, I merely seek to assist the NLRB in understanding the work of graduate student employees directly relevant to overruling *Brown*, as I am familiar with their working conditions at both public and private universities, unionized and non-unionized. A prior version of this brief was submitted for the NYU case (2-RC-23481), which unfortunately was settled without addressing *Brown*.

Previously, as a graduate student employee, I earned a psychology PhD in five years (2005-10), granted by Central Michigan University (CMU). During the first four years, I was employed by CMU variously as a “Doctoral Research Fellow,” “Research Assistant,” and “Teaching Assistant.” CMU is a public research university founded in 1892, with an approximate enrollment of 28,000 students/year. At CMU, my colleagues and I organized an academic employee union of approximately 550 graduate student employees, achieving recognition under the Michigan Employment Relations Commission (5/5/09). As the first president of that union, I was intimately familiar with the working conditions of graduate student employees, both inside and outside of my bargaining unit, having met personally with over 400 of them. During the final year of my PhD program, I also completed an internship as a “Graduate Assistant” at the University of Rochester (UR). UR is a private research university founded in 1850, with an approximately enrollment of 10,000 students per year. Most recently, I am an

Assistant Professor at Tulane University. Tulane University is a private research university founded in 1834, with an approximate enrollment of 13,000 student/year. Here, I teach and mentor graduate students, many of whom are university employees. I have no vested interest in the NLRB's present decision other than informing the NLRB about the general work of graduate student employees so as to benefit science and academia.

This amicus brief does not represent the views of any particular university.

ARGUMENT

I. Introduction

Through this amicus brief, I seek to provide the NLRB with knowledge about the work of graduate student employees relevant to weighing Question 2: Should the Board adhere to, modify, or overrule the test of employee status applied in *Brown*, and if so, on what basis? In doing so, I refer back to the more detailed series of questions raised earlier in the settled NYU case, namely whether *Brown* should be overturned (Section II) and whether graduate student researchers should be afforded union rights (Section III). In responding to the former, I seek to clarify the basic nature of job titles and responsibilities of graduate student employees and suggest an apprenticeship model of employment, with unit considerations based on job responsibilities rather than titles. In responding to the latter, I advocate that graduate student employees engaged in research-related responsibilities are employees of their respective universities (Sections III.B to III.E), including in the case of external grant funding (Sections III.F and III.G), and that restricting externally-funded researchers from collective bargaining units could have far-

reaching, unintended consequences (Section III.H). This information supports an overruling of *Brown* but also suggests several important nuances worth considering by the NLRB in its ruling.

II. Overruling *Brown*

Should the Board modify or overrule *Brown University*, 342 NLRB 483 (2004), which held that graduate student assistants who perform services at a university in connection with their studies are not statutory employees within the meaning of Section 2(3) of the National Labor Relations Act, because they “have a primarily educational, not economic, relationship with their university”? 342 NLRB at 487.

A. Overview

Graduate student employees have a dual role as student-workers who, much like apprentices in other fields, ought to maintain the right to unionize under the NLRB. Here, I clarify the nature of the work completed by graduate student employees and advocate that the NLRB overrule *Brown* by recognizing an apprenticeship model of employment.

B. Graduate Student Employees: Titles and Responsibilities

Decisions regarding the collective bargaining rights of graduate student employees are complicated by their diverse job titles and responsibilities, which vary considerably within and across universities. Various job titles include Teaching Assistant, Lab Assistant, Graduate Student Instructor, Research Assistant, Research Fellow, Administrative Assistant, Library Assistant, Athletic Assistant, or, more vaguely, Graduate Assistant. Whereas these job titles are seemingly descriptive, titles may correspond poorly to actual job responsibilities. Personally, I have met with “Teaching” Assistants who predominantly or completely engaged in research or administrative

duties. Similarly, I have met “Research” Assistants whose primary responsibility was teaching graduate-level courses.

Due to university hierarchy, colleges may allot individual departments a specific number of particular positions (e.g., 5 Teaching Assistant and 5 Research Assistant positions), which may not reflect the specific needs of a given department in a particular year, leading to employee misclassification. In some departments, this misclassification can be severe. Further, these job titles may be outdated, given the job responsibilities completed by graduate student employees. So-called Research “Assistants” frequently engage in relatively independent research projects. Many so-called Teaching “Assistants” are actually instructors, responsible for teaching large courses. Often, graduate student employees maintain two or more positions concurrently, or consecutively from the fall to spring semesters.

If this NLRB ruling distinguishes between specific factions of student employees, I would advocate doing so based on their job responsibilities, rather than specific and sometimes-arbitrary job titles. Here, I carefully consider the job responsibilities of three broad classes of graduate student employees.

- Teaching-Related Graduate Student Employees. These graduate student employees provide a variety of teaching-related services, including instructing courses, assisting in the instruction of courses, tutoring, proctoring, grading, guest-lecturing, and instructing lab sections, recitations, or practica / applied course sections.

- **Research-Related Graduate Student Employees.** These graduate student employees assist professors in completing research projects, assist other graduate and undergraduate students in completing research projects, complete relatively-independent research projects that may go toward thesis or dissertation credit, complete relatively-independent research projects that do not go toward course credit, write and assist in the writing of internal or external grant applications, write or assist in the writing of research articles for publication in scientific journals, mentor less-advanced researchers, maintain administrative paperwork for ethical or “Institutional Review Board” approval, conduct advanced statistical analyses using computer programs, attend conferences to disseminate research findings, and participate in research lab meetings focused on brainstorming study ideas or interpreting study results.
- **Administration-Related Graduate Student Employees.** These graduate student employees have the most diverse responsibilities, which may include administrative or office work with direct relevance to future career aspirations, administrative or office work without relevance to future aspirations, coaching or assisting in the coaching of student athletes, and maintaining the university library.

C. The Graduate Apprentice Model of Employment

In ruling on whether to overturn *Brown*, I advocate that the NLRB adopt a Graduate Apprentice Model of Employment (GAME). The responsibilities of academics are often illusive to those outside the profession, but the work of graduate student

employees most resembles that of apprentices in other fields. The majority (though not entirety) of their work involves developing skills, under the mentorship of a more senior academic mentor, necessary for advancing toward future career goals. Under GAME, graduate student employees with teaching-, research-, or administrative- related responsibilities all carry the unifying theme that much of their work contributes both to the goals of the university and the goals of their own careers.

III. Protecting the Rights of Early-Career Researchers

If the Board modifies or overrules *Brown University*, supra, should the Board continue to find that graduate student assistants engaged in research funded by external grants are not statutory employees, in part because they do not perform a service for the university? See *New York University*, 332 NLRB 1205, 1209 fn. 10 (2000) (relying on *Leland Stanford Junior University*, 214 NLRB 621 (1974).

A. Overview

In the public's eye, the work of graduate student employees in research-related positions may be much more enigmatic than the work completed by those in teaching- and administrative- related positions. Simply put, most people understand the gist of what a teacher or office worker does but are less likely to have had a personal interaction with a researcher on the job. Here, I advocate that research is work (Sections III.B to III.E). Further, I advocate that externally-funded research, with one rare exception, falls under the purview of the NLRB (Sections III.F to III.G). Moreover, the failure to extend collective bargaining rights to externally-funded research-related graduate student

employees could have far-reaching, catastrophic consequences for the vast majority of employees at private universities (Section III.H).

B. Research is Work

The responsibilities of paid research-related graduate student employees (see Section II.B) are most clearly work. In fact, these graduate student employees contribute to a number of products valuable to the university, including mentoring undergraduates, completing studies, publishing scientific articles, and receiving externally-funded grants. These products influence the ability of universities to attract and retain undergraduate students as well as academic employees. These products influence the skills developed by undergraduate mentees, affecting their ability to advance to graduate school or work effectively in their careers. These products influence whether and how quickly faculty members are promoted. These products greatly influence whether externally-funded grants will be awarded to the university or renewed. External grant funding, in particular, has far-reaching implications for the financial health of universities (see Section III.H). Whereas some universities have downplayed the importance of research as genuine work, graduate student employees employed in research-related positions directly contribute to university sustainability.

C. Research Work Extends Beyond Theses and Dissertations

Some universities have erroneously argued – *ad nauseam* - that research is non-work because graduate student employees engaged in research-related activities are merely advancing their own theses or dissertations. This argument may have had traction 50+ years ago when graduate student employees had quite different and perhaps more

limited obligations. Today, this argument holds no water, given the broad job responsibilities of graduate student employees engaged in research (see Section II.B). As a concrete example, of the 13 publications that resulted from my personal graduate student employment, only 2 were associated with my thesis or dissertation coursework.

Furthermore, a fundamental component of research apprenticeship involves learning to understand the importance of efficiency. A basic premise of research is that all scientific discoveries will eventually be elucidated; therefore, the goal of research is not to make scientific discoveries *per se* but to make them *efficiently* so as to maximize the benefit of the discovery to society – not to “cure cancer” but to “cure cancer more quickly.” As such, graduate student employees engaged in research-related responsibilities learn to optimize efficiency. Rather than seeking to separate paid work from coursework, graduate student employees are taught to seek overlap between the two, where possible, to increase research efficiency. Therefore, in circumstances where a thesis/dissertation overlaps with paid work, it does not invalidate the contribution of that work; if anything, it validates the apprenticeship model of work. The notion that paid work and coursework must be separated represents a false dichotomy at odds with a realistic understanding of graduate student employment.

D. Research Work Output is Inherently Nebulous

Some universities have argued that graduate student employees engaged in research-related responsibilities should not be classified as real employees under the NLRB because their work output is nebulous, as compared with other academic positions. The direct contributions of teaching- and administrative- related employment

responsibilities to the university are easily and directly quantified: lectures are given to students, papers are graded, students learn, meetings are held, library books are returned to the shelves, photocopies are made, and the like. The direct contribution of any *particular research project* to the university is less clear – a particular project may succeed or fail in its primary aims, producing or failing to produce any sizeable benefit for the university. However, the long-term contributions of the *institution of research* to a university are unequivocal: undergraduate students mentored, publications, scholarly reputation, attracting and retaining students and academic employees, and grant dollars. The university acts as an incubator of numerous research projects, knowing that many will fail, but that the long-term benefit will be substantial. The value of research to universities must not be downplayed merely because research entails risky, nebulous, and often long-term rewards.

E. The Moral Harm of Classifying Research Work as “Non-Work”

A careful weighing of the evidence shows that graduate student employees engaging in research-related responsibilities should be classified as employees under the NLRB, and I would add from my personal experience that misclassifying paid researchers as non-workers inflicts needless moral harm. I have witnessed graduate student employees engaged in research-related responsibilities having their status as employees questioned during pre-election bargaining unit discussions with university management. I have seen the reaction of researchers whose names were left off an *Excelsior list*. I have seen the reaction of researchers who had their union representation election ballots challenged and never counted, under the guise that their research is not

“real” work. The reactions include shame, embarrassment, anger, and tears – expected responses to being told that one’s chosen occupation does not matter, that their work does not adequately support the university, that their work is insignificant, that their work is not real work, and they are not employees. Misclassifying work as non-work may enrich the university’s bottom line while dehumanizing the very people the university claims to protect. Whether intended or not, this NLRB decision carries implications for the prestige of scientific research in the U.S., the value of conducting science, and the ability of science to recruit the best and brightest to programs and occupations in the field.

F. Financial Obligations Under External Research Grants

The argument to exclude graduate student employees funded by external grants is based on false assumptions about grant-funded research. A common misconception is that external grant applications (e.g., to the National Institutes of Health , or the National Science Foundation) are submitted by and awarded to individual research teams (or individual researchers). In actuality, although research teams can be expected to write the vast majority of a grant application, the application itself is regularly submitted by the university, and all funds are awarded to the university, not the individual research team.

Because grant funds are the property of the university, not an individual research team, externally-funded graduate student employees must remain eligible for collective bargaining unit membership under the NLRB. Specifically, the graduate student employee maintains employment by the university, not the granting agency. If grant funding is cut or non-renewed and a graduate student employee is under contract with the university, the university remains responsible for fulfilling that contract; the granting

agency avoids financial liability. A researcher's salary and benefits are customarily negotiated within the university, and allotted in the grant application budget section; the external funder is not expected to take part in negotiating researcher salaries. It is safe to say external granting agencies have no interest in being designated an employer of graduate student employees at private universities, and if exceptions exist in a limited number of cases, the burden of proof should be on the employer to clearly justify the exclusion of a researcher from a bargaining unit.

G. Research Grants Fundamentally Differ from Research Contracts

One important nuance in externally-funded research is the distinction between a research “grant” and a research “contract” (http://grants.nih.gov/grants/funding/contracts_vs_grants.htm). Research grants are more commonplace and are highly flexible. A research team writes a grant application, which is submitted by the university. If funded, the research team is responsible for using the funds *in the spirit of* supporting the research described in the grant application. There is no obligation to follow the specific methods, procedures, or budget of the original application because science advances so rapidly that the best study worth conducting may have already changed since the grant application was reviewed and funded (which may take over a year). Under a research grant, there is no obligation that the research must meet any of the original objectives or show any particular findings that were hypothesized in the original application. This level of freedom to conduct good science is consistent with the idea of university-level autonomy – that the university is the employer of the research team, and the granting agency is not.

A possible exception involves research contracts, which are less commonplace, but worth noting. Research contracts involve an external funder awarding money in exchange for specific goods or services, such as the production of 5,000 influenza vaccines, 100 fMRI machines, 1 therapy manual, etc. Contracts are often less about producing new knowledge, and more about using a research lab's existing knowledge to yield a tangible product for distribution. Research contracts are substantially different from research grants in that the funder may be substantially more involved in the implementation of the project. In the case of graduate student employees funded via external contracts, the private university should weigh the available evidence to make the case that they are or are not the official employer.

H. "Indirect Costs" in External Grants Fund a Hidden Cadre of Employees

The removal of graduate student employees funded by external research grants from collective bargaining units could have far-reaching, catastrophic consequences for the vast majority of employees at private universities. In writing a grant application, research teams request two types of funds, those for "direct costs" and those for "indirect costs." Direct costs cover the costs of the research project itself. The general public may be less familiar with indirect costs, which are additional funds that go to the university receiving the grant in order to help cover the costs of administrative overhead: utilities, maintenance, standard office equipment, secretarial salary support, management's salary support, legal support, security costs, and other costs. For most grant applications submitted to the National Institutes of Health, the indirect costs are calculated as a percentage of the direct costs. Larger, more research-focused universities have more

overhead, and thus receive a higher rate for indirect costs. For example, a large private research university may receive indirect costs of 55% of the direct costs (e.g., a bonus \$550,000 on a grant for \$1 million), and a small public university may have an indirect cost rate of 10%. Some types of smaller grants use a single, low indirect cost rate (e.g., 8%) regardless of the university applying.

Reimbursement for indirect costs provides an enormous financial incentive for universities to conduct externally-funded research. Further, these funds also benefit nearly every employee at any university with externally funded research, either by supporting their salary (as in the case of maintenance, office, or managerial employees) or benefits (anyone who uses the parking lot, restrooms, cafeterias, photocopy machines, printers, etc.). If graduate student employees can be eliminated from collective bargaining units based on receiving funds from an external granting agency, so too should every employee at a private university receiving indirect costs from an external grant.

CONCLUSION

In summary, this amicus brief supports an overruling of *Brown*, suggests that collective bargaining membership be retained for graduate student employees engaged in externally-funded research, and documents several nuances worth considering by the NLRB in issuing its ruling.

Dated: June 18, 2014

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that the foregoing BRIEF OF AMICUS CURIAE IN SUPPORT OF THE PETITIONERS was served electronically on this 18th day of June 2014, to the parties and their counsel in this case by electronically filing via the NLRB website (<http://mynlrb.nlr.gov/efile>) and/or via email to the respective parties.

/s/ Michael Hoerger

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